**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF JUDGES**
**SAN FRANCISCO BRANCH OFFICE**

**FRESH ORGANICS, INC., d/b/a REAL FOODS COMPANY, a Wholly-Owned Subsidiary of NUTRACEUTICAL CORPORATION**

and

**NUTRACEUTICAL CORPORATION**

and

**ADRIEL AHERN, an Individual**

and

**JOSHUA PEACH, an Individual**

and

**SARAH GENLOT-JOSLYN, an Individual**

and

**UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 648, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION**

Cases 20–CA–31416-1
20–CA–31449-1
20–CA–31461-1
20–CA–31664-1
20–CA–31953-1

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*Caren P. Spencer* and *David Rosenfeld,* of *Weinberg, Roger & Rosenfeld,* Oakland, Calif., for Charging Party Peach

## DECISION

### Statement of the Case

**JAMES M. KENNEDY, Administrative Law Judge:** This case was tried in San Francisco, California for 8 hearing days between March 21 and April 22, 2005, upon a consolidated complaint issued on December 20, 2002 by the Acting Director for Region 20 of the National Labor Relations Board. The complaint is based upon an unfair labor practice

charges filed by three individuals and Local 648 of the United Food and Commercial Workers Union (the Union). The initial unfair labor practice charge was filed on August 11, 2003 [1] and the others followed on September 2 and 8, October 9 and December 23. Some were subsequently amended. The consolidated complaint alleges that Fresh Organics, Inc. d/b/a Real Foods Company, a wholly-owned subsidiary of Nutraceutical Corporation, has violated §8(a)(3) and (1) of the National Labor Relations Act. At the hearing I granted the General Counsel's motion to join Nutraceutical Corporation as a respondent, based on a complaint amendment alleging that both corporations are a single employer. For the most part, I shall refer to Fresh Organics as 'Respondent', pluralizing when referring to both. With that in mind, Respondents deny all the salient allegations.

## Issues

The complaint alleges that in response to a nascent union organizing drive in 2003, Respondent discharged employees (and charging parties) Adriel Ahern and Sarah ("Mitch") Genlot-Joslyn in violation of §8(a)(3). It also asserts that on August 29 it closed one of its retail stores ("24th Street") in violation of §8(a)(3), thereby discharging 29 other employees; later the complaint asserts, in May 2004 it refused to rehire one of the 29, Kim Rohrbach, also in violation of §8(a)(3). In addition, the complaint alleges that certain of Respondent's supervisors in violation of §8(a)(1) interfered with, restrained and coerced employees in their §7 right to engage in union organizing.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by both the General Counsel and Respondents, I make the following

## Findings of Fact

### I. Jurisdiction

Based on both the pleadings and certain testimony, Respondent is a corporation headquartered in Park City, Utah. It is the wholly-owned subsidiary of Nutraceutical Corporation, a Delaware corporation, also having its headquarters at the same location in Park City, Utah. The shares of Nutraceutical Corporation are publicly traded on the NASDAQ.

Respondent operates a small chain of retail grocery stores specializing in organic foods, produce and vitamins. It admits that during 2003 its gross volume exceeded $500,000 and that it directly received goods from outside the state of California valued in excess of $50,000. Accordingly, it is an employer engaged in commerce within the meaning of §2(2), (6) and (7) of the Act.

### II. The Unfair Labor Practices

#### a. The Setting

Before early 2002, Jane and Kimball Allen operated a small chain of neighborhood grocery stores in San Francisco and Sausalito. The chain consisted of at least four stores and traded as "Real Foods." The stores were, and still are, rather small. They are located in or near residential areas. None of them has a dedicated parking lot, although street parking is available to varying degrees depending on the neighborhood. All of the stores had a reputation for carrying organic produce, i.e., produce grown free of chemical additives. Indeed, one of the stores, that located on Stanyan Street, is said to be the birthplace of organic produce retailing.

[1] All dates are 2003 unless otherwise indicated.

That reputation came to the attention of Nutraceutical Corporation which was seeking to extend its business. Nutraceutical is a publicly-traded manufacturer of vitamins and food supplements. It sells its products directly to health food stores, preferring to avoid distributors. Apparently, sometime in 2001 it determined that it might improve its market share by marrying the organic food store concept with its vitamin and food supplement lines. As a result, in March 2002 it acquired three of the stores operated by the Allens. These were the Sausalito, Noe Valley (24th Street), and The Haight (Stanyan Street) stores. They did not acquire the store located on Polk Street. Three months later, in June 2002, Nutraceutical acquired a fourth store, the Thom's (unrelated to the Allens' Real Foods) on Geary Boulevard. All four stores are similarly-sized, about 5000 square feet. The Stanyan Street store, occupying an old house, is divided in half by a delivery area, formerly the garage. One side sells grocery and produce while the other side sells the vitamins and food supplements. The other three are rectangular, consistent with the retail industry term, "small box."

When Respondent acquired these stores, it also placed the predecessors' employees on its payroll and began operating them relatively seamlessly, leaving the "Real Foods" and "Thom's" logos on them while adding its own "Fresh Organics" logo. All the stores have relatively small staffs. For example, although the 24th Street store, when it closed, had over thirty employees on the payroll, because of limited schedules and shifts, it was normally staffed with 11 or fewer employees. Early on Sundays, for example, it operated with only two. No doubt the others operated in a similar fashion.

As a corporate matter, Nutraceutical Corporation created Fresh Organics on the fly, rehiring one of its former managers, Bruce Remund, as the chain's general manager and appointing him as Respondent's Executive Vice President. Remund lives and works in Utah, officed at Nutraceutical's Park City headquarters while residing in Salt Lake City. He reports directly to Bill Gay, Nutraceutical's Chief Executive Officer. The record is not entirely clear how frequently after the acquisition Remund visited the stores, but it may be inferred that it was about once a month. The stores operated reasonably well without his presence. The stores' management and buyers were experienced and knew their jobs. Furthermore, Remund kept in touch with the stores by telephone and other electronic means.

Remund testified that one of Nutraceutical's objects in acquiring the stores was to create a new concept to see whether their idea of merging organic produce with vitamins/food supplements was a viable business plan. According to Remund, the strategy was to allow the four stores to proceed for about a year essentially in the manner in which they had been purchased, allowing him and Nutraceutical management time to learn the business while at the same time developing a concept for its new brand, Fresh Organics. Sergio Diaz, Nutraceutical's director of marketing and sales, testified that the idea was to try to present their products in neighborhood markets while displaying a French country motif, something evocative of the produce markets of Provence, yet computer-age efficient. Diaz testified he was responsible for developing the concept. Indeed, that model was transmitted to some of the Real Foods holdover managers, including Gerald Burt, the erstwhile store manager at Sausalito. Indeed, according to Remund and Diaz, the Sausalito store was, from the beginning, believed to be the store that would most likely become 'the concept store.' Some of Respondent's early plans are memorialized in a so-called Operational Update meeting program dated July 18, 2002 shortly after the takeover. There, Remund discussed a wide range of subjects with the store managers; however, the 'concept store' was not mentioned in the agenda, probably because the plan had yet to crystallize. In addition, two Nutraceutical officials made training presentations on store safety and human resource policies which were being imposed. Some employee incentive programs were proposed at the meeting but were never implemented.

b. Early Evidence of Union Animus

Jeffrey Irish was one of two co-managers of the Thom's location when the takeover occurred. Since Remund did not want two managers in a store, Irish initially became the assistant manager. He was terminated in February when the assistant manager job was eliminated and he refused to take a pay cut. The Thom's store, having a more spacious office, was often used for managerial meetings. Irish testified that he attended such a meeting there, conducted by Remund, in November 2002. He recalled that the day before the meeting a labor union had distributed leaflets at the store. The next day the leafleting became a topic of conversation shortly before the meeting began. Remund asked Irish if it was true that such leafleting had occurred. When Irish responded it was, according to Irish, Remund said: "Well, if they ever unionize, Bill Gay would close the store." Irish says he was shocked, and therefore had a good memory of Remund's comment. Remund did not deny making such a remark to Irish.

c. The Employees at 24th Street; More Animus

According to Joshua Peach, a produce worker at the 24th Street store, in April the employees began discussing whether they might be better off being represented by a union. Several of the employees were entertaining misgivings about working for a large corporation and had been more comfortable working in a family business atmosphere. Peach says it was not until May that the employees began getting serious about unionizing. He said he was initially approached about it by cashier Adriel Ahern. Peach says she sounded him out about whether he would be interested. He was, and attended the first employee meeting held after work at 9 p.m., on May 26 at the Chinese restaurant next door. Ahern testified that she had first contacted a union on April 23. After the employees began meeting regularly at the restaurant, they settled on UFCW, Local 648 as the union best suited to their interests; in June other employees, including Jonathan Burkett, began soliciting authorization cards for Local 648 from other 24th Street employees.

However, on May 2, well before the employees had even settled upon Local 648, product coordinator Sara Hasson (a managerial employee), sent Remund an e-mail saying "Bruce—there is a union drive in progress at 24th St. I just found out yesterday and I don't think Conal [store manager Conal Wilmot] knows anything about it. . ." She offered to speak to him further about what she knew. Remund replied the next day that he would call Wilmot "as well as our Sr. Executive Team as to how I should proceed." On May 22, Remund convened a managers meeting at the Thom's store. The attendees included both Wilmot and Dave Kloski, then the manager of the Stanyan store but Wilmot's predecessor at 24th Street, along with Hasson. Kloski testified he had a separate conversation with Remund before the meeting began. His testimony:

Q (By Mr. GUERRA) And what was said during that conversation?
A (Witness KLOSKI) Well, the one thing that I remember clearly was, [Remund] told me that he had had a meeting with his boss the night before, and that his boss told him that he would rather close the store than run a union shop there.
Q Who is his boss?
[Objection interposed.]
THE WITNESS: Bill Gay. [Nutraceutical CEO.]

Kloski later repeated what Remund had said to several others, including Wilmot, Hasson and one of his own department managers Eric Guy. Kloski said in later conversations he had with Remund and Wilmot, they told him the union organizers were Ahern, Burkett and cashier Lisa Fagundes.

Nevertheless, at the May 22 managers meeting, a Nutraceutical staff attorney, Steven Langto, conducted a training session regarding the proper way management should respond to union organizing. Remund described it as a "do's and don'ts" discussion. Remund says he never did tell Wilmot that Hasson had reported a union was targeting his store.

Sometime in mid-May, Ahern approached Genlot-Joslyn to inquire if she was interested in union representation. She replied that she was and Ahern testified that Genlot-Joslyn became very excited about the Union and immediately became very involved in the process.

During the workday on May 26, and aware of the employee meeting scheduled for that evening, part-time cashier Jessie Dameron had a conversation with store manager Wilmot. She gave the following testimony about it:

Q [By Ms. SCHNEIDER] Did you ever have a discussion about the union with a supervisor or manager?
A Yes.
Q When was that conversation?
A That conversation took place on May 26th, Memorial Day.
Q And where was that conversation?
A It was in the front of the store at the cash register.
Q And who was present during that conversation?
A Just Wilmot and myself.
Q What was said and who said it?
A As he approached, I asked him if he was going to the meeting later on that night. He asked me what meeting? And I said to him, the union meeting. He said, 'who told you about the union meeting?' And I replied, 'Mitch,' as in Mitch Genlot.

Also, in late May, Kim Rohrbach had two separate conversations with two individuals she believed were statutory supervisors. The first, on May 28, only 2 days after the first employee meeting, was with the assistant manager at 24th Street, Ryan Rostvold. It occurred as they were leaving a San Francisco Giants baseball game. She asserted to him that 'Surely he had heard about the Union.' He responded that he had not. Subsequently, she says he told her he wasn't sure that unionizing would be the best approach with Fresh Organics. She offered that she wasn't sure either. The second was with Anthony Gadola, the manager of 24th Street's vitamin and health and beauty aids department. Rohrbach had heard that Gadola was upset because no one had informed him about the union organizing and he was supposedly feeling left out and alienated, both by the employees and management. She testified that upon observing to Gadola that she had some 'divided feelings' about unionization, particularly since Mitch Genlot-Joslyn was heavily involved: "Anthony said to me that he felt that in his experience such things as organizing drives brought about divisiveness in the workplace. I said that was a possibility. Anthony finally said to me, as a result of organizing, my 'co-workers who are interested in forming a union might find themselves unemployed rather than better employed.' I don't recall if I said anything at that point." On cross–examination, Rohrbach conceded that Gadola may have simply been expressing his opinion regarding the consequences of union organizing, rather than saying that employees would lose their jobs if they became represented by a union. I find that he was expressing his personal opinion and that Rohrbach understood it as such.

A similar conversation occurred between Gadola and Genlot-Joslyn, apparently sometime in mid-June. Genlot-Joslyn initiated it near the cash register and simply assured Gadola that the employees were not working against him and he shouldn't take it personally. She says he told her he was just feeling left out, since management wasn't keeping him informed either. She does not say Gadola said anything more.

On June 10, Dorothy (Dot) Adams, another 24th Street cashier, attended a birthday party for Kloski's wife Taryn at the Kloskis' apartment. Adams testified:

> . . . Taryn and I were in the kitchen chatting and Dave from the other room said, you know, calling to me, 'Hey Dot, what do you know about unions?' And I said, 'Well, not very much. I know my husband is in a union.' And he said, 'Well, how do you feel about unions?' And I said, 'Well, it's working out great for us.'
>
> And he said, 'Well, what do you know about union stuff at 24th Street?' And I said, 'I don't know anything, Dave.' And at this point Taryn interrupted and said, 'Dave, if you have anything to say, be direct.' So, Dave asked me directly what I knew about Adriel, Mitch or Kim [Rohrbach] unionizing.
>
> Q And what did you say?
> A I said I didn't know anything.
> Q And was this prior to -- do you know if this was prior to Mitch's termination?
> A Yes, it was.
> Q And how do you know that?
> A Because I went to the store to warn them.

Kloski did not really deny Adams's testimony, but did truncate the incident: "Q. And did the union issue come up in the conversation? A. Sort of. I asked her if she had heard anything about the 24th Street store lately. She said, 'No.' I asked her had she talked to Adriel lately. She said, 'No.' As far I can recall that was the extent of it."

I see no reason not to credit Adams's testimony in its entirety; her recall of the details was impressive. It appears, therefore, that by June 10, Respondent knew or had good reason to believe that both Ahern and Genlot-Joslyn were two of the principal union organizers. At the same time, it also knew that Burkett and Fagundes were involved. There was also reason to suspect Rohrbach, although the evidence regarding her involvement was then inconclusive, given her equivocation to Rostvold.

d. The Discharges

Beginning in mid-June, a number of incidents which the General Counsel asserts are evidence of union animus began to occur. The first concerned the daily sweep log at 24th Street. The store, like any, requires a swept floor for both safety and esthetic reasons. Over the years, even before Respondent's takeover, a weekly log was kept, to be initialed by the employee(s) who swept both the produce department and the remainder of the store, showing the time of the sweep. There was no written rule concerning the requirement, though some believed its maintenance was OSHA-mandated. Apparently, during May and/or early June, the store ran out of forms and the logs could not be initialed.

On June 16, Wilmot told Ahern, serving as the lead cashier for the day, that they needed to have a meeting. Subsequently, during their discussion Wilmot him told her that the logs needed to be kept and it was her responsibility to see that the sweepers did so. She says she later learned that he or Rostvold had said something similar to fellow lead cashier Fagundes. When Ahern and/or Fagundes told the other employees about Wilmot's reemphasis over the sweep logs, Kim Rohrbach was taken aback. She confronted Wilmot and Rostvold about it asserting that they had more or less ignored the sweep log for months on end and it wasn't right to suddenly begin chastising them; it was adding unnecessary stress to the workplace. Rostvold denied they had ignored the logs 'for months on end.' The record does not show Wilmot's response, if any.

Another view of the sweep log history comes from Mitch Genlot-Joslyn. According to her, prior to the Fall of 2002 the sweep logs had been posted on a regular basis. She remembers that once that autumn, after she had elected part-time status, she did a sweep but when she went to the Board where the log was normally posted, she found none. She asked Wilmot about the log sheet. She testified that he told her that they had run out of copies and did not have a copy machine in the store.

Aside from whether the logs were being properly kept, there is no evidence that the store was not being properly swept. At most, it appears to be a question of whether Wilmot and/or Rostvold or someone else in responsibility had bothered to post fresh log forms.

Still, in June 2003, when Wilmot spoke to Ahern and, later, Fagundes, his admonishment on its face does not appear to be connected to any union activity. On the other hand, there is no real showing that the log issue was a significant problem. Wilmot did not testify; as a result, there is no evidence regarding what he perceived to be the problem, if any. Were there sufficient copies as had been the problem earlier? Was it a question of making certain a log form was posted on the wall? If so, who was responsible for that? Had the lead cashiers fallen into bad habits? Had store management fallen into bad habits? Wilmot's failure to testify leaves these questions, and others, unanswered. Certainly immediately after Wilmot made his request, employees properly initialed the log (GC.Exh. 5) and there is no showing that log-keeping was a problem thereafter. Moreover, no one has contended that the store had not been swept timely either before or after Wilmot spoke to these two lead cashiers.

Two days later, Remund conducted a staff meeting after work. At this meeting he announced Respondent had instituted a length of service award recognizing employees for their time with the company. According to him, Respondent was providing the same benefit to the Fresh Organics employees that was normally given Nutraceutical employees. The only two employees who were eligible under the program were Gadola and a 15-year vitamin department employee, K'Pu Bahimwakputa. Employee Peach recalls that Remund seemed to be urging employees to stay with the company as long as those two had. If they did, they would be similarly recognized for making Fresh Organics their career. Likewise, Rohrbach asserted Remund was asking for loyalty. Her testimony: "He said that it was up for individual workers to decide whether they wanted to be roll [sic] [role] players at the store or not. And to decide how long they intended to stay with this job or was it something they were just passing through. From there he began to talk about a new incentive program for workers based on years of service with the company."

The longevity service award was a gift debit card which could be used at a wide variety of retailers. The record does not show its actual dollar value. The same award was also given to longtime employees at the other three stores, although Remund does not appear to have been involved in the Stanyan Street meeting.

This service award program was not repeated. In 2004 no such length of service recognition was granted. Remund explained that Nutraceutical had canceled the program.

On June 20, Wilmot complained to Ahern about the manner in which the cooler was being stocked. The nature of this complaint is not entirely clear, as Ahern had been training a new employee.

In this same time frame, Wilmot notified Mitch Genlot-Joslyn that her annual review was due and that he wanted to have a meeting with her on June 26. As noted previously, Genlot-Joslyn, formerly a full-time employee, had by then become part-time. She had worked on and off for the Company since November 2000, initially being hired by Kloski. She was a student and had left and come back in November 2001. She testified that during her tenure she had undergone one earlier appraisal, in December 2002, 3 months after Respondent began operating the stores. Due to a hiatus in her employment, that appraisal was characterized as a

6-month evaluation. When the General Counsel subpoenaed that form, Respondent's counsel advised that it could not be found and was not in her personnel jacket. I thereupon permitted Genlot-Joslyn to testify about it. She said the performance review was conducted by Sara Hasson, one of the product coordinators (and who, as noted supra, was the first to notify Remund of union organizing). Hasson's 2002 appraisal resulted in Genlot-Joslyn being promoted to assistant floral buyer and a getting a 50¢ per hour raise. Respondent does not challenge her testimony.

The only blemish on her record, if it can be called that, was an early admonishment (before the raise) concerning an innocent effort to obtain some assistance on a task without asking a manager. Kloski explained that she needed to ask a manager in such an instance.

On June 26, without having given her the promised annual appraisal, Wilmot discharged Genlot-Joslyn. She had been called in early that day and met with Wilmot and Rostvold. She said Wilmot told her that after looking at her 'last review,' the company was going to go in another direction. He also told her the Company was "exercising our right of at will employment."

At the hearing Respondent adduced some evidence from some of Genlot-Joslyn's co-workers that she was considered 'bossy' and that she seemed to be somewhat less cooperative than they would like. In January 2003, when she became part-time, she primarily served as a cashier, working the late shift on Thursdays (4 p.m. to 9:30 p.m.) closing the store, and opening the store on Sundays (8:30 a.m. to 5 p.m.). [2] Before converting to part-time, she had been in charge of floral sales. When she switched, she trained Sean Andrews, a new hire, as her successor in floral sales.

Genlot-Joslyn acknowledges that on two occasions after training Andrews, she observed that the flower displays needed some adjusting. Since she and Andrews no longer overlapped shifts, she left two notes in his cubbyhole about what she had seen. Wilmot saw at least one of the notes and asked Andrews if it bothered him. Andrews acknowledged that he was a 'little annoyed,' but told me he would not have mentioned it if Wilmot hadn't asked. Wilmot later told Genlot-Joslyn that leaving notes was inappropriate, that she should go through him so as not to be seen as being 'bossy.' She agreed. Nonetheless, I am not certain exactly why Wilmot sought Andrews out; it was he who had assigned Genlot-Joslyn to train Andrews and her notes can reasonably be seen as a continuation of her assigned duty. Indeed, her note contained a diagram of the flower cart describing the proper flower layout.

In addition, several other employees conceded that they made complaints about Genlot-Joslyn early in the year. At the hearing, one, Fagundes, agreed that sometimes the employee complaints about Mitch were unwarranted and overblown. One of the charges against her was that she didn't seem to respond promptly to calls for cashiering when things got busy. Fagundes said sometimes employees who were called upon to help were unable to do so because they were legitimately involved in other duties—on the phone performing business calls, such as ordering ". . . and they would [explain] when they got up front. We'd be angry a lot for no reason sometimes." In any event, Genlot-Joslyn agrees that Wilmot spoke to her about not responding to calls to the register quickly enough, but says after he spoke to her she made a better effort to get there. This entire scenario seems to have begun and ended early in 2003 or even before. Andrews, to the extent that he was aware of the shortcoming, said that he was surprised at Mitch's discharge because if she deserved it, it should have come 6 months earlier. From his vantage, he thought her performance since the beginning of the year was much improved. Other complaints, such as Jon Burkett's, were fairly petty. He complained she

[2] Genlot-Joslyn was entrusted with store keys and access codes to the safe.

was not washing sample dishes at the end of the shift. Since she was only working one night per week and was in charge of closing the store, it is difficult for me to conclude that this was a serious or even real issue.

Another incident indirectly developed by Respondent is the contention that Genlot-Joslyn somehow created a 'negative atmosphere' on Sunday mornings. Reed Rickert was a new, and relatively short-term employee who worked on Sundays. Ahern recalls that once she observed Genlot-Joslyn speaking to trainee Rickert regarding the benefits of unionizing the store. Later, according to Ahern, Wilmot asserted to her that 'negativity' was occurring on shifts where Ahern was serving as the lead cashier. He told her that Rickert had quit and had said one of the reasons was because of 'negativity' on Sundays emanating from Genlot-Joslyn. Furthermore, Ahern reported that Wilmot said that he had learned this from Rickert who had taken an out-of-state vacation shortly after being hired and had called to seek an extension which Wilmot denied. Respondent's argument arises from an extrapolation of some testimony given by Ahern during the General Counsel's direct examination relating to Ahern's discharge.

Ahern's testimony:

Q (By Ms. SCHNEIDER) Okay. Did you have any other conversations with a supervisor about your work performance or duties?

A (Witness AHERN) About within the first two weeks of July on a date that I don't recall, Conal [Wilmot] called me into the office with he and Ryan and he told me that he felt that I was negative and that it was affecting my work. I defended myself saying that I wasn't negative and that what he may have been perceiving was the fact that I didn't feel -- I didn't really like Fresh Organics, I was feeling very anti-corporate stance at that point, and I didn't agree with a lot of the decisions they had been making at the store, that I was upset about that. But, that definitely did not affect my work, definitely did not affect my customer service. And that's what he was bringing up.

He, as I recall, in that meeting brought up Reed Rickert having -- Reed Rickert was an employee that had not worked there for very long, had gone away on a week long vacation, and had called from wherever he was to ask to extend the vacation, and Conal said he was not able to do that for him, and that he could either quit or, you know, come back to work when he was scheduled to do so. And Conal told me that when Rita (sic) [Reed] quit at that point, he had said that he felt there was too much negativity in the store, that the weekends were unpleasant to work in. And I really don't think I had a response to that, because I didn't feel that was accurate.

I knew that there was a lot of union talk going on outside of work, that we were—at that point—and I told Conal at this meeting that I felt like he was bringing me up to the office every week to punish me for something, and that I was doing a very good job. I had upped the sweep log, I had upped the facing, I had done everything that he asked me to do, and he was still, you know, calling me out on this negativity, which I didn't see.

Of course, neither Rickert nor Wilmot [3] testified about what actually happened concerning Rickert and his supposed complaint about Genlot-Joslyn. Genlot-Joslyn, naturally, has no knowledge about any of this. Therefore, Ahern's testimony really has no probative force favoring Respondent on this issue since she has no first-hand knowledge about what actually caused Genlot-Joslyn's discharge. To the extent Respondent is attempting to use Ahern's testimony as substantive support for explaining its decision to discharge Genlot-Joslyn, it is relying on secondhand information. Not only did Respondent not call Wilmot to testify, it did not call his assistant Rostvold, although Rostvold likely had pertinent testimony to provide.

In any event, Respondent never delivered to Genlot-Joslyn the appraisal form which had been prepared for discussion on June 26, GC.Exh. 18. Indeed, rather than discussing any of the shortcomings supposedly listed in that exhibit, Wilmot and Rostvold simply told her Respondent was exercising its "at will" right to discharge her. In utilizing that model, Respondent avoided any dispute concerning its actual reasons for the discharge, since it takes the position it is not obligated to give any. Furthermore, it would not have to explain any discrepancy between her unproduced December 2002 evaluation which had been sufficiently positive to warrant a raise and a promotion. Curiously, that positive evaluation had occurred at roughly the same time that the employee complaints, such as they were, had been made. Instead of demonstrating rationality for discharging Genlot-Joslyn, Respondent's behavior here seems to have been arbitrary and with no factual support coming from Wilmot and/or Rostvold. In fact, Respondent regularly utilizes an employee performance improvement procedure to stimulate better performance from its employees, yet it never invoked that procedure with respect to Genlot-Joslyn. Neither did its managers speak to Genlot-Joslyn to inform her that that she needed to improve herself in any specific manner. I note that the undelivered performance review form asserts that she "talks rather than works and sets bad example for new employees. Is not a team player." If these were truly her shortcomings, it would have taken little effort on management's part to have corrected it. Furthermore, excessive talking and not being a team player can readily be seen as code for engaging in union organizing. Second, such assertions would lend themselves to refutation. The 'at will' rationale evaded that risk. Frankly, Respondent counsel's explanations for Genlot-Joslyn's discharge are so thin they fail the test of plausibility. They are certainly unsupported by Genlot-Joslyn's immediate supervisors who never testified.

Four days after Respondent discharged Genlot-Joslyn, an employee named Kristin Hornstra requested a schedule change. In late March she had been hired as a full-time employee for the 24th Street store's produce department. At the same time she was studying to be an elementary school teacher, a position she held at the time she testified. At the end of July Hornstra needed to attend her college's required 3-week intensive teacher education program that would not fit her regular schedule at 24th Street. She thought that working a part-time schedule for those 3 weeks would be a good way to accommodate the conflict. Accordingly, she asked both produce manager Catherine ('Cat') Hughes and store manage Wilmot if that could be arranged. Hughes was initially receptive, but Wilmot told Hornstra she would have to

[3] Assuming Ahern has accurately recited Wilmot's thinking, Wilmot would be making little sense. Under that version a short-term employee asked by long-distance for permission to extend his vacation and Wilmot promptly denied it, so the employee quit. After the employee announced his quit, Wilmot would have us (through Ahern) believe that their conversation continued and the employee said something to the effect that working on Sundays was a negative experience and that Genlot-Joslyn was the cause of it. On its face that sounds improbable, unless it is the remark of an instantly displeased employee whose credibility on the point must be doubted due to his anger. That any manager would accept such a complaint as valid is unlikely unless he had an ulterior motive.

quit and reapply for the job. Hornstra did not understand, saying she was aware that similar accommodations had been made for others.

Afterwards, Hornstra spoke to some fellow employees about what had happened, including Adriel Ahern. On June 30, Ahern and employee Rita Morris, together with Hornstra, met with Wilmot and Hughes to revisit the issue. Ahern describes her participation:

> So, I walked up to the office and Kristin kind of stated her case, and they, Conal [Wilmot] asked me why I was there, and I explained that it if it was a change in store policy that it affected everybody and that I was there to support Kristin, because we thought that she was a good worker, and we didn't understand why they weren't facilitating her request.
>
> And they defended themselves saying that it was going to be a very difficult thing to schedule and they couldn't hire a new person, but the couldn't really give -- without not letting that person have the hours when Kristin came back. It was really a scheduling issue and that was all it was about.

Ahern worked in the grocery department, not produce, and her interest in Hornstra's problem did not appear to sit well with Wilmot. She was exceeding her area of interest and not following what Wilmot deemed the appropriate procedure. She testified that as the employees were leaving, Wilmot asked her to stay for a moment. She did so. She described what happened:

> . . . they seemed very upset that I had -- they said that they were upset because we hadn't (sic) had a meeting with them without notifying them that we were going to have a meeting, and that it really wasn't any of my business, and that it was really a scheduling issue and pretty much that I should mind my own business.
>
> That's what the rest of that meeting was.

As it turned out, due to other circumstances, Hornstra was able to obtain an adjusted schedule anyway due to another employee's situation.

Nonetheless, the General Counsel notes that Ahern's participation in this incident was protected by §7 as a 'mutual aid and protection matter.' [4] From the General Counsel's perspective, Respondent's displeasure directed toward Ahern here contributed to its later decision to discharge her.

That discharge occurred 3 weeks later, on July 23. Shortly before that date, according to Stanyan Street store manager David Kloski (and Wilmot's predecessor and mentor), Wilmot called him to ask his advice about firing Ahern. Kloski testified: "Conal was asking me for advice, what would I do, because he felt uncomfortable terminating her. He told me he wanted to talk to Human Resources about it, but that [General Manager] Bruce [Remund] was forcing him to go ahead and terminate her." The record does not reflect what advice Kloski gave, but Wilmot asked Ahern to work an early shift on July 23.

When she arrived, Wilmot fired her, saying "We're going to use our at will rights, we feel like you're unhappy here and that your negativity affects the store, and we are going to let you go." Ahern then left the store.

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[4] In pertinent part, §7 of the Act states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . . "

A little while later, cashier Jessie Dameron, upset upon learning of Ahern's discharge, quit in protest. In the conversation Dameron had with Wilmot, he told her more than he had told Ahern:

> (Witness DAMERON) I told him that I was choosing to give my notice because I was upset with the decisions that had been made, and I asked him why, what was his reasoning for firing my co-worker.
> Q Did he respond?
> A At first he told me that it was just between the two of them. Later on in the conversation he told me that it had to do with her negative attitude.

As noted, Wilmot did not testify and much of the evidence relied upon by Respondent in its defense comes from its examination of Ahern. There is one first-hand item, the testimony of Remund, who said he observed Ahern being rude to a late-arriving customer shortly before closing on June 18 for the store meeting. He described what occurred:

> We were in the process of closing the store. It was approaching closing time, and I was standing near the -- one of the entrances to the store that Adriel was preparing to lock. And a customer hurriedly approached the door, and said, 'Are you still open?' And Adriel's response was, 'Well, we're getting ready to close for a store meeting, but you better hurry up and get out of here because we need to conduct the meeting.'

Ahern, who does not have a specific recollection of the incident, nevertheless denies that any rudeness occurred that evening, though she does allow for the possibility that friendly jocularity may have taken place which Remund misunderstood. Her direct testimony:

> Q (By Ms. SCHNEIDER) Do you recall a time when Bruce Remund came to the store in June for a meeting after work?
> A (Witness AHERN) There was an all store meeting that he was in attendance in June.
> Q Would you ever have been rude to a customer in Bruce Remund's presence?
> A No, I would not.
> Q Would you have ever been rude to a customer, period?
> A No, I would not.
> Q But, in particular, would you ever have been rude in front of the Vice President of the company?
> A Absolutely not. There is no reason for me to be rude in front of Bruce. He's the one who pays my paycheck. And even if he wasn't there, there's no reason for me to be rude to customers. I pride myself on my customer service. I feel like I put myself out there to do good work and I believe that I do.
> Q Is it possible that Bruce or anyone could have misconstrued something that you said to a customer?
> A It's possible.
> Q Do you ever kid with customers?
> A Absolutely. We have a lot of regular customers in that store, it's a small community and I was on a teasing relationship with a number of them.

On cross, she testified:

> Q Do you recall telling the customer that they needed to hurry up and get out because the store was about to close?
> A I would never have said that and I do not recall that.

In late October 2002, Respondent, through then 24th Street store manager David Kloski, gave Ahern an annual performance appraisal. Wilmot, then the manager-to-be, also signed the form. She was rated 4 of a possible 5 in all 9 rating categories (Kloski told her he didn't give

5s). Kloski summarized the review saying "Doing great job and meeting all expectations" and commented, "Keep working here for another year." There were no areas noted which needed improvement.

Moreover, it appears elsewhere in the record that Ahern was the principal employee who performed training duties for new cashiers. She was well-liked by her fellows, particularly those she had trained. Employee Sonja (Simon) Knaphus said "[Ahern] was far and away the most positive team leader. She was, I would say, probably the most positive employee, always very friendly, always had a great rapport with customers, with the other employees. She was phenomenal." Dot Adams said Ahern "was one of the best employees we had. She was great. . . . She was great at assigning tasks, following up with them, she was great with customers. She knew what she was doing. She was accessible . . . The hardest part of being a supervisor [5] is making other people do something they don't want to do, and Adriel was really good at that." Fellow lead cashier Lisa Fagundes said of Ahern: "In the beginning I worked with her like three days a week almost and towards the end just one day a week . . . She was like the most knowledgeable employee in the grocery department by far. She knew everything, she was the one that we went to if we had a problem. She was really nice and sweet and just kind of like the backbone of the grocery department."

e. Analysis of the Discharges of Jenlot-Joslyn and Ahern

It is quite clear that the General Counsel has made out a prima facie case that both discharges were in violation of §8(a)(3). Although it knew of the employees' nascent union interest in early May, Respondent had actual knowledge as of June 10 that both Genlot-Joslyn and Ahern had become the two main union organizers. [6] That fact can be discerned from Adams's testimony, because even Kloski at Stanyan Street was aware that those two were involved and probably Rohrbach as well. Moreover, Dameron had inadvertently identified Genlot-Joslyn to Wilmot. Significantly, the individual who discharged them, Wilmot, was not called to testify and the only evidence which Respondent can really rely upon is what the two dischargees reported he said during their exit interviews. Everything else was developed through cross examination of the dischargees and others who candidly admitted, as any employee might, that they had shortcomings or that they were spoken to on occasion to correct a perceived weakness. None of these rose to a level where the company's employee correction process needed to be invoked, although there are a number of such forms in the record pertaining to other employees. Furthermore, both individuals had recently received positive performance appraisals. Did their performance decline so rapidly that the correction procedure was inadequate? That seems most unlikely. Moreover, there is Kloski's testimony that Wilmot told him Remund had instructed him to fire Ahern and that he was reluctant to do so. Apparently Wilmot well knew Ahern was a valuable asset to his store. She was his principal trainer, she knew the grocery inside and out, and she was well-liked by her fellow employees and customers. He simply didn't want to get rid of her but, based on Kloski's testimony, Remund was ordering it anyway.

Remund's involvement is quite noteworthy. He claimed not to be a hands-on manager, but was clearly demanding Ahern's ouster at the very least. Furthermore, it was through him that a number of statements were made constituting strong union animus arising from the corporate parent's level. In November 2002, Remund told Thom's then-assistant manager Jeffrey Irish, that Nutraceutical's CEO would close the store if the store was unionized.

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5 Meaning 'lead cashier.'

6 They had also fingered Burkett and Fagundes.

Furthermore, Remund repeated the remark to Kloski at the May 22 managers meeting. [7] While not directed to any statutory employee, it is clear that Respondent and its parent, as institutions, considered unionization such a significant threat that it would take the drastic measure of closure to prevent it. Closure, of course, is far more extreme than discharge, but obviously, the discharge of a prounion employee is subsumed by such a threat. Gay's message was clear: Don't allow unionization to happen. Kloski carried Remund's (and Gay's) message to the managers, including Wilmot and Hasson.

Furthermore, there were some suspicious goings-on which began as soon as the organizing came to Remund's attention. The first is the application of the Nutraceutical length of service award program to Fresh Organic's stores. It seems neutral on its face, but given its timing and announced annual nature, that neutrality must be doubted, for it disappeared the following year. [8] According to Remund, its withdrawal was due to a Nutraceutical corporate decision. Moreover, employees reasonably viewed it as an out of character appeal for loyalty at a time when their interest had turned to union representation. In that circumstance, I find the evidence to be strong enough to qualify as a violation of §8(a)(1). Remund's explanation is no explanation at all and therefore it can only be seen as an offer of benefit in response to employee organizing activity; it was no longer useful after the organizing was scotched. Reasonable employees could perceive that it was designed as an appeal for loyalty in the face of union organizing. Indeed, the test for such a violation is not whether the benefit has actual value (most were ineligible), but whether the grant may reasonably be seen as tending to interfere with the free exercise of employee rights under the Act. I find that this offer can reasonably be perceived in that manner. The employees who so perceived it did so quite reasonably.

In any event, Kloski told neither Genlot-Joslyn nor Ahern why they were being fired, except for the vague accusation of Ahern being unhappy and negative. He repeated the negativity charge to Dameron when she demanded an explanation. Other than that, he invoked what he (or someone advising him) termed 'our at-will rights,' apparently in the belief that the phrase offered some protection from having to state the real reason. That circumstance entirely negates Respondent's argument in brief that the two had engaged in misconduct of one sort or another —in Ahern's case the supposed failure to monitor the sweep log, followed by the petty concern over the cooler stocking; —in Genlot-Joslyn's case, the notes to Andrews and the absurd reliance on what Rickert supposedly told Wilmot about her negativity on Sunday mornings. Nothing these two employees are now charged with having committed ever arose to the level where it had to be documented and addressed for the purpose of remediation. Moreover, in large part what these employees described was nothing more than normal daily oversight by a manager. Indeed, the managers would not even testify to these supposedly perceived weaknesses. That certainly weighs against the claimed legitimacy of their discharge.

Another dubious factor weighing against Respondent is the fact that both employees had received positive annual appraisals, belying the shortcomings which supposedly manifested themselves after the two began organizing for the Union. Indeed, some of those perceived shortcomings occurred prior to the positive evaluations. Adding to that oddity is the question of why Respondent could not find the appraisal for Genlot-Joslyn. As the General Counsel

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[7] Remund denies making the statement in the terms Kloski described. He says Kloski must have misunderstood what he was saying during the meeting. He does not deny the earlier and near-identical statement to Irish. Frankly, give the mutual corroboration of Kloski and Irish, Remund's alternate possibility must be rejected.

[8] Remund denied that he had knowledge of union organizing at the time he decided to grant the benefit. The evidence demonstrates that his denial cannot be credited.

observes, her personnel jacket contained other items, including a security record about a stalker incident which Genlot-Joslyn had suffered. Did someone remove the appraisal because it was inconsistent with the defense Respondent wished to launch? I cannot answer those questions definitively. I can, however, conclude that Respondent has been entirely unable to mount a rebuttal, much less a persuasive rebuttal, to the General Counsel's case.

Rather clearly a prima facie case has been established. All the elements of a §8(a)(3) violation are present. Respondent had knowledge of their union organizing, there is a temporal connection to that activity and there is both direct and inferential evidence of Respondent's union animus. The direct evidence includes policy announcements by Remund to his supervisory staff, including both Irish and Kloski. [9] Furthermore, Wilmot's reaction to Ahern's coming to Hornstra's aid is of some weight here. Ahern was acting as an employee representative might act and no doubt information about her approach was passed up the ladder to Remund or higher. That was seen as 'negativity' when, in fact, it was protected by §7. Moreover, Respondent's lack of candor and its connected failure to call either Wilmot or Rostvold in its defense permits me and the Board to infer that union animus was a factor in its decisions. Neither I nor the Board is obligated to accept Respondent's explanations (minimal as they are) for the discharges at face value. We are permitted to infer animus where the reasons fail the test of plausibility and are supported only by evidence of poor quality. *Justak Bros. & Co. v. NLRB,* 664 F.2d 1074, 1077 (7th Cir. 1981); *NLRB v. Buitoni Food Corp.*, 298 F.2d 169, 174 (3rd Cir. 1962). See also *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

All the elements of a discharge in violation of §8(a)(3) are present in both employees' cases and Respondent has utterly failed to rebut them. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Accordingly, I find Respondent violated §8(a)(3) and (1) of the Act when it discharged Genlot-Joslyn and Ahern.

f. Closure of the 24th Street Store

It is undisputed that Nutraceutical created Respondent in order to provide a different marketing scheme for its core product of vitamins and food supplements. Likewise, it is undisputed that Respondent's acquisition of the four stores in San Francisco allowed it to learn the business of neighborhood grocery and organic produce retailing. Furthermore, it was certainly reasonable for Respondent to retain the bulk of the sellers' existing staffs and to consider a marketing strategy for the marriage of the two principal businesses, neighborhood organic foods sales and vitamin and health food supplements. Finally, the testimony of Sergio Diaz, Nutraceutical's director of marketing and sales, to the effect that Respondent wanted to created a marketing concept seeking to create a European or French country motif as a foundation for its new brand of stores, seems entirely realistic.

However, insofar as selecting the 24th Street store for closing, there are a number of facts which appear, on their face at least, to suggest that its closure was motivated by antiunion factors rather than due to a neutral business decision. Still, those facts are countered strongly by Respondent.

First, it is uncontested that the store initially thought to be most appropriate to close was the Sausalito store. Choosing it as the store to undergo remodeling was an open secret among the managers at least. Furthermore, Sausalito was operating at a loss, while 24th Street was far and away the most profitable of the stores. How then, did Respondent come to change its mind

[9] I do not deem it necessary to rely upon Gadola's remark reported by Rohrbach. On its face it seems to be opinion; moreover, even if Gadola is a statutory supervisor, he is out of the decision-making loop.

and select 24th Street as its choice for the concept store? And, why did it select the date it chose, August 29, which might well be considered the height of the produce season?

Remund testified that he wanted the store to reopen in March 2004 and he thought it would take 6 months to perform the remodel —3 for the demolition, putting the plan together and getting the building permits approved; —and 3 for the actual work. He asserted that March was the beginning of the organic produce season. In support, Respondent provided its profit and loss summaries for 24th Street (R. Exh. 9) from March 2002 through the closing at the end of August 2003. He also provided the same information for the other three stores. In reaching that conclusion he pointed to 24th Street's sales records. I would have expected the produce sales to show a steady increase over the summer of 2002, but in fact, produce sales flopped around early that year. March : $142, 000; April: 131,000; May: 138,500; June: 153,500; July: 151,000; August: 149,000; September: 148,000; October: 126,600; November: 119,000; December: 107,000. Certainly the August and September months show that the season would not end in August as he suggested. The expected downturn would not occur until October. Furthermore, if 2002 is the guide, sales would not be steadily significant again until May of each year, since there seems to be an $11,000 expected downturn to occur in April. March would be promising, but April only modest, while May would not quite match March. Indeed, March and April of 2003 turned out to be modest months: $122,500 and 119,800, respectively. March of any given year, therefore, was hardly a month to target for reopening. May seems to have been a better choice. In May 2003, for example, produce sales were a pretty good $137,000.

That being the case, I am not quite certain why an end of August closure was chosen. It would mean missing an expected excellent September. If the closing had been put off until the end of September, then the 6 month period would still be in time for the height of the season which really does not begin until May of each year. To be sure, a good March might be missed, but it would have already been offset by the better previous September.

Therefore, I do not think Remund's explanation for choosing the end of August 2003 for closure really makes sense to the extent that he based it on produce revenue. Some other explanation seems more likely. I will make findings on that reason below.

It will be recalled that on May 2, buyer Sara Hasson notified Respondent's general manager and executive vice-president Bruce Remund, that a union organizing drive was underway at 24th Street.

Well prior to that occurrence, however, Diaz had been working on the design for the concept store. Although the Stanyan Street store had early been ruled out due to its split-store configuration, the other three were relatively congruent with one another. They were one-story rectangles with roughly the same number of square feet, about 5000. To be sure, doorway placement, cash registers and built-in refrigerator-freezers were arranged differently, but the stores' similarity is plain to see. Whatever interior differences the stores may have had was unimportant because the store to be chosen was to be entirely gutted and rearranged following the new design. The components of the new store, according to Diaz, were to follow a 'four-foot model.' That meant all of the components were to be interchangeable because they were no shorter than four feet or were multiples of four feet. Diaz: "Everything it is a multiple of four. Every fixture, every equipment, everything is multiple of four, which means that when you have the space, you divide it by fours so you know how many fixtures and things you are able to plug into the space." Therefore, from Diaz's or a designer's standpoint, it made little difference which of the remaining three stores was selected as the concept store. He also busied himself with determining the appearance of the stores, from the floors to the walls and ceilings, from the cash registers to the coolers and the grocery aisles to the produce layouts. Nonetheless,

following their initial presumption, all of Diaz's models were based on the layout of the Sausalito store. Prior to the closure of 24th Street, no 24th Street-specific drawings were made. [10]

In addition, Diaz was also tasked to perform a demographic study. To accomplish this, he mined the 2000 official census reports for each of the three neighborhoods, Sausalito, Noe Valley and Geary Boulevard. His report looked for potential customers in each distinct area, though he was handicapped to some extent because he was obligated to use the postal zip code delineations utilized by the census bureau; these did not congruently match the neighborhoods but did provide the best available information.

Diaz delivered his demographic study to Remund on April 22. This the same time period when employees were beginning to search for a union. Indeed, while there had been some preliminary inquiries of other unions by the employees, it was on April 23 that Ahern actually approached UFCW Local 648. And, it was not until May 2 that Hasson sent her e-mail to Remund warning him that an organizing drive was underway.

The demographic study, according to both Diaz and Remund, demonstrated to them that the proper store to be closed and remodeled as the concept store was not Sausalito, but 24th Street. Remund also added some other factors, including financial reports and workers compensation claims.

Insofar as the demographic study is concerned, Remund noted that the population density was much higher in Noe Valley than in Sausalito and the total number of household units was almost double those of Sausalito: Noe Valley: 4100; Sausalito: 2500. That, he said, translates into more potential buyers for multiple household members. And there were three times the number of renters in Noe Valley than Sausalito, meaning the potential for new customers was higher at 24th Street. Finally, Remund pointed to demographic findings that there were far fewer automobiles in Noe Valley than Sausalito. Twenty percent of the Noe Valley population did not have cars while only five percent of the Sausalito residents did not have cars. This meant a more captive customer base. Those residents could not simply get into their cars and drive to a another market, as they could and did in Sausalito and Mill Valley where two competitors, Molly Stone's and Whole Foods, were doing business. These were respectively one mile and three miles distant from Respondent's Sausalito store. The 24th Street store did not face such competition, though there is a supermarket nearby.

Remund testified that his review of Diaz's study caused him to rethink his assessment that the Sausalito store should be the concept store. All factors he reviewed led to the conclusion that 24th Street was the ideal location, including the fact that 24th Street was by far the most profitable. It was carrying the entire chain. Indeed, the General Counsel makes a very salient argument about profitability: Why would Respondent shut down its only profitable store and use it for the concept store experiment while the other three were performing poorly? If the 24th Street store was carrying the chain, isn't it contrary to good business sense for Respondent cut off that source of revenue? Yet Respondent, supported by its expert witness, argues that profitability was not important—proving the viability of the 'concept' was.

Other connected questions also arise: If Remund decided that 24th Street was to be the concept store in April, why did he wait until the end of August, particularly if profits didn't matter

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[10] At one point, Remund offered that the Allens were unable to find earlier blueprints for that store which could be used as a starting point. That appears to be true, but the former store manager, Kloski, had seen them stored in the store's office, evidently to the ignorance of everyone else. Either way, this was a small facility and any professional designer could have easily measured the store and prepared a blueprint to work from. That did not happen until after the store's closure.

very much? Why, on July 18 did he allow the 24th Street store to order a new awning, and on August 21, slightly over a week before the store closed, obtain the building permit to install it? [11] In addition, four new employees were hired for the store in the month before it closed. [12] When the decision to close was actually implemented, why, if the decision had occurred back in April, was it done so abruptly and without notifying its manager Wilmot, the employees, the customers, the landlord (the Allens) [13] and without applying for the construction permits?

Insofar as the facts relating to the latter questions are concerned, they are essentially undisputed and will be recounted only briefly. However, in August, prior to any hint that 24th Street was in jeopardy of closing, an incident occurred which the General Counsel asserts contributed to Respondent's decision to choose 24th Street over Sausalito.

On August 7, Remund and Diaz were at the store visiting with Wilmot. Employees Jonathan Burkett (one of the authorization card solicitors) and Simon Knaphus asked if they could talk to them. Burkett began the meeting telling Remund that this was 'not a union meeting,' simultaneously saying that he and Knaphus supported unionization of the store. Burkett then presented Remund with a list of, depending on how one characterizes them, either demands or suggestions. After going over them briefly, Remund asked Burkett to e-mail the list to him and said he would meet again with Burkett on August 20 to discuss them. The material Burkett presented was the product of employee collaboration which had occurred a day or two earlier. Among the employees it was referred to as the 'Wallaby paper' due to a wallaby drawing on the document.

A day later, Wilmot called both Burkett and Knaphus back to his office. He accused them of sabotaging him by making those demands. They did not respond.

Burkett e-mailed the list to Remund on August 17. On August 20, Remund and Wilmot met with Burkett to tell him he would address the list at the next store meeting. Burkett's testimony:

> ". . . Bruce said that it would be very quick meeting, and then said that we would set up a subsequent meeting [in] which the entire store would participate, so following the store meeting, and I proceeded to have concerns about voicing everything in that meeting and the certain people said that they were afraid to speak up because of the terminations of Mitch and Adriel.

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[11] Respondent explains that it really didn't matter when, or if, the awning was installed, since it affected the outside of the store and had nothing to do with the remodel. While true, it does not explain why the new awning would be purchased at a time when a decision had supposedly been made in April to close the store for 6 months; nor does it explain why the building permit was obtained a week before the closure. Both are inconsistent with Remund's testimony. Eventually, of course, the awning was installed at the Thom's location, supposedly because of the remodeling difficulties Respondent encountered at 24th Street, which at the time of the hearing had yet to begin.

[12] Sunny Jardine and Amelia Moore on August 11; Joshua Carman on August 15 and Carl Weiner on August 18. These hires maintained the store employee population at its full complement of roughly 34. See G.C.Exh. 40.

[13] The lease did not obligate Respondent to notify the landlords, but it is beyond reason to fail to give a landlord some sort of 'heads-up' notification. After all, the interior of the landlord's property was to be completely gutted, affecting the overall value of the building, particularly if, for some reason the tenant walked away after demolition and never replaced the interior. All landlords would need that reassurance. Besides, maintaining a good relationship with the landlord is simply a good business practice.

> They proceeded to say that we do not need a -- it is not a problem, we have an open door policy. If people have problems, they can come and talk to us, and I suggested something like a box where we could put things in there anonymously, but they said we do not need this. It is an open door policy, and we will just go with this meeting about two weeks after that, or at least two weeks after that.

The store meeting was scheduled for September 10 and announcements about it were posted in the store shortly after Remund spoke to Burkett.

However, there is a deceptive feature to all this, for Remund acknowledged in his testimony that he never intended to conduct the September 10 meeting; he says he knew at the time he promised Burkett the September 10 meeting the store would already be closed and the employees dismissed.

In the meantime, sometime between August 8 and 18, Wilmot and Rostvold gave Knaphus, who had accompanied Burkett to the August 7 meeting, a performance review. Knaphus testified that Rostvold told her she was rated as 'poor' on interpersonal skills. Wilmot explained that the rating was given because of the "way" she had gone into the August 7 meeting. Again, neither Wilmot or Rostvold testified and Knaphus's testimony on the point is undenied. Their treatment of Knaphus violated §8(a)(1) as it interfered with her §7 right to engage in concerted activity for the mutual aid and protection of employees. *Mammoth Mountain Ski Area*, 342 NLRB No. 80 (2004). It is true that this violation was not specifically pleaded in the complaint. Nevertheless, it would appear to have been fully litigated. See *Golden State Foods*, 340 NLRB No. 56 (2003).

General Counsel's Exhibit 4, dated August 25, 2003, is a document entitled "Minutes of a Special Meeting of the Board of Directors of Fresh Organics" and apparently recounts the events which took place that date at this Park City meeting. Present were Remund and Leslie M. Brown, Jr., Respondent's only two corporate directors. Also present were Sergio Diaz and Stan Soper, whom Remund described as 'our inside counsel,' meaning, I believe, a member of Nutraceutical's house counsel staff. Brown principally serves as the chief financial officer of Nutraceutical; his role with Respondent was not thoroughly explored. Remund says Brown directed him to be the corporate secretary for the meeting. It would appear, however, as is typical of such meetings, that the minutes were drafted by an attorney, probably Soper, most likely in advance. It cites two orders of business: 1. a 'general discussion and review of the business and operational status of the company.' This is a one line reference and contains no specifics of the nature of the discussion. 2. Store Remodel. The minutes recite that motions were made, seconded and unanimously approved to: a. authorize the closing of the 24th Street store for a remodel and to ratify any steps already taken 'in connection therewith;' and b. to authorize the corporation's officers to take whatever steps were necessary to undertake and complete the remodel, including closing the store, terminating or transferring employees, retaining architects, contractors and designers, etc.

The General Counsel observes that slightly over 4 months had passed between the purported late April decision to close, based on Diaz's demographic study, and the corporate authorization to actually close the store. Remund explained the delay as due to the varying schedules and vacations of the participants, even though both he and Brown work at the same location in Park City. Diaz also works there and presumably house counsel does as well. Frankly, I do not find much comfort in this explanation. In fact, given that Respondent itself is not a publicly held corporation, I question whether a special directors meeting even needed to be held.

Nonetheless, Respondent points to this event as evidence that the corporate minutes reflect only a business purpose behind the closing of 24th Street.

As noted, the parties agree that the store was closed abruptly. There was no advance notice to the employees, to the landlord or to the vendors. Indeed, a number of vendors attempted to deliver on the morning of August 29, only to find the store shuttered. Some dropped off deliveries at other stores. As a result, much of the fresh produce had to be discarded, though some was given away. Non-perishables were later transferred to other stores over the next week or so.

On the night before the closure, Remund took manager Wilmot to dinner where he informed Wilmot that the store was to be closed that night for the remodel. They then proceeded to the store where they advised the night crew of the shut-down. In the meantime, Remund had had the Nutraceutical human resources department prepare notices of termination for all the employees. These were delivered to their residences by an overnight delivery service on the morning of August 29. They included a final check and a severance amount. The only persons retained were Wilmot and a few employees designated as 'key' employees, such as department managers and vitamin specialist K'Pu Bahimwakputa. In all, 29 employees were discharged.

In the next few days, some oddities occurred. The first, on August 29, closure day, was at the Board's Regional Office. Remund went to the office that day to give an affidavit in the unfair labor practice charge concerning the Ahern firing. Although he had closed the store the night before and was dealing with the closure's effects that very day, he did not mention the store's closing in the affidavit he gave the investigating Board agent. When questioned about the omission, he asserted he did tell the agent, but the information was left out. Frankly, I have difficulty in accepting that such momentous information would have been omitted by the investigator as irrelevant.

The second occurred the following day, a conversation at Stanyan Street between Stanyan manager Dave Kloski and Sergio Diaz. Kloski testified:

Q (By Mr. GUERRA) Did you speak with Sergio?
A Yes.
Q And what was discussed?
A The closure of the [24th Street] store and the fate of the employees.
Q Do you recall what was said during that conversation?
A A couple of things I recall.
Q What do you recall?
A The things that stuck out to me mostly were when I asked him if the closure of the store was killing two birds with one stone, and he replied 'yes, the timing is good for that.' By that I meant the union problems, and I felt certain that he knew that and was responding in kind. I also asked him some general question about the employees that had been terminated, and his response was 'fuck em'. And that stuck in my mind.

Diaz, who is Gay's son-in-law, never denied making the comment. Respondent, instead, asked Remund if he had made such a comment, though it is not clear to whom he supposedly spoke. Remund's 'two birds' were not the Union and the concept store remodel as Kloski meant, but referred to creating the concept store and removing certain workers' compensation risks supposedly inherent in the 24th Street store configuration. In large part, this is a non-sequitur, although one 24th Street Store employee had suffered a herniated disc while working in the outmoded cooler. Nonetheless, Kloski's testimony about his conversation with Diaz is hardly free of ambiguity. He acknowledges that the Union was not specifically mentioned. Still, Kloski was well aware of the previous threats uttered by Remund on Gay's behalf to the effect that Gay would close a store before allowing a union to represent its employees. He was, I think, correct to believe that Diaz's response was simply a confirmation of that oft-repeated threat. On balance, I find Diaz knew that Kloski was referring to the Union as one of the "two

birds." Why wasn't Diaz asked to speak for himself? There being no answer to that question, Remund's attempt to water down the ambiguity is unavailing. In any event, Diaz's "fuck em" attitude expressed to Kloski toward the employees evidences Respondent's attitude and in part confirms that Gay has no compunction about closing stores to combat union organizing. Gay treats employees fungibly, as a commodity that can easily be replaced.

Similarly, on September 3, Eric Guy, a department manager, had occasion to call Rohrbach's residence which she shared with a woman Guy was dating. According to Rohrbach (Guy did not testify) during the conversation, Guy said:

> [Witness ROHRBACH] We were talking about the closure, it was very much on our minds, having happened the previous week.
> Q [By Ms. SCHNEIDER] And so tell us exactly what you said and what Eric said?
> A Eric said to me that he had heard from a manager, who had been witness to a direct remark, had been a direct witness to a remark made by Bruce Remund that Bruce Remund had stated to him, this other manager, that Bill Gay, who is the CEO of Nutraceuticals, and Bruce s superior, would rather close stores than to deal with unions in any way, shape or form. And after Eric related this to me he said, you re not hearing this from me.

While the General Counsel has alleged this statement to be violative of §8(a)(1), it is also offered as proof of Respondent's motive for closing the store. Insofar as the latter is concerned, I note that Kloski was Guy's manager and that Kloski on May 22 had heard the comment from Remund. He said he later passed the information to Guy and two others. In large part, I find that in the conversation reported by Rohrbach, Guy was simply repeating what Kloski had told him in May. In that sense, it really adds nothing additional by way of proof concerning the motive behind closing the store.

However, Guy at Stanyan Street and Gadola at 24th Street are alleged to be §2(11) supervisors. As such, Respondent would normally be responsible for any anti-union remarks they may have made. In Gadola's case, I earlier found that his remark in late May concerning employees possibly losing their jobs, was merely the expression of opinion by an individual who was essentially out of the loop insofar a really knowing what was happening. Both Rohrbach and Genlot-Joslyn had felt it necessary to reassure him that the union activity was not aimed at him and he agreed that management was not keeping him informed. Therefore, the employees to whom he spoke knew he was only expressing an opinion. That opinion cannot rise to the level of an unfair labor practice because the employees could not reasonably expect him to be speaking for management.

Guy, similarly, has no knowledge of anything beyond what Kloski told him. Had Kloski made that remark to a rank-and-file employee, it would have been cognizable under §8(a)(1). Here, in the aftermath of the closure, Guy is simply commiserating with Rohrbach; indeed, he is telling her that threats of closure in this very scenario had been made earlier. He is suggesting she should advise someone that there is evidence that the closure was for anti-union reasons so they can search for it. Guy is not in any way seeking to intimidate her regarding the exercise of §7 rights. He is, in effect, saying that she should seek some sort of help to rectify the situation. Accordingly, it is not necessary to determine if he is a §2(11) supervisor for *respondeat superior* purposes. He simply was not interfering with Rohrbach's rights under the Act; he was suggesting she seek to vindicate them. This allegation, too, will be dismissed.

Later, in October, Remund told Kloski that the firings were 'unethical' but not illegal, because the Union had not actually demanded recognition from the Company. Kloski's testimony:

A [Witness KLOSKI] Yeah. When I got back, I got married in September 2003, I went away for about a month, and when I came back we had a meeting where we discussed it.
Q [By Mr. GUERRA] Where were you at the time?
A I believe we were walking between the Stanyan Street store and the cafe, to get a sandwich.
Q Approximately what time would that have been then?
A Lunchtime.
Q Was it just you two?
A Yes.
Q And what was discussed in that conversation?
A The thing that sticks out in my mind was the statement that he made that 'what we did was unethical but I don't believe it was illegal.'
Q What was the context of that statement?
A Well, I was basically telling him that I didn't feel good about the closure, and that I thought it was a mistake.
Q Did he at anytime explain what that comment meant?
A Yeah. He told me that based on his conversations with their counsel that because the employees in question, or because the union didn't actually approach them --
MS. PLAZA DE JENNINGS: Your Honor, we're going to again object based on the attorney/client privilege, objection.
ADMINISTRATIVE LAW JUDGE KENNEDY: Overruled.
THE WITNESS: Because the union hadn't formally presented them with anything, that it wasn't actually a union drive, or it wasn't legally a union drive yet.

Some of the closure questions raised by the General Counsel are addressed by the two expert witnesses called by each party. While I found their respective testimonies to be somewhat helpful in determining what steps a retail business would take when contemplating a short-term shut-down of a small store in a residential neighborhood, I found both to be somewhat extraneous, given the question of the timing of the announcement and the actual explanations offered by Remund and Diaz as quoted by Kloski and others, not to mention the odd circumstances of the closing itself. While I can understand the testimony of Respondent's expert Thomas James [14] to the effect that a small company wanting to undergo a 6-month closure might choose to keep that decision under wraps until the last moment, I am unimpressed with the manner Respondent handled it. It continued to hire people in the last month; it unnecessarily ordered the awning; and it allowed Wilmot to respond to the entreaties of employees Burkett and Knaphus a few days earlier in a hostile and deceitful manner. If the decision to close had already been made, at that point, I think Remund would have told Wilmot to leave those two alone and let the corporation deal with the issues they raised. That would have still kept the closure decision from Wilmot if Remund thought it important to do so. And, the August shut-down meant losing the expected excellent September produce revenue.

All its behavior during August suggests that the decision to close 24th Street was not made until after Burkett and Knaphus began acting like a union on August 7. The corporate decision came only 2 weeks later, allowing for sufficient time for Remund to have taken the matter up with his superior Gay, the one whose policy it was to close stores in the face of union organizing. Thus, even if James's testimony about the innocence of its abrupt behavior is the business norm for small operations such as 24th street, it does not follow that Respondent was

[14] James was undoubtedly correct that the remodel could not be performed while keeping the store open. It is simply too small. Likewise, night work would have been too noisy and disturbing for it is closely surrounded by residential units.

following the norm. If it were, we would not be seeing the purchase of the awning and pulling the building permit for demolition virtually contemporaneously with the closure. We would not be seeing the hire of new employees; we would not be seeing a corporate resolution coming only 4 days before the closure; nor would we be hearing subsequent admissions against interest uttered by Diaz and Remund in the aftermath.

Accordingly, I find as a matter of fact that Respondent had not made the decision to close the 24th Street store in April, but in fact did not make the decision to choose 24th Street until shortly before the August 25 corporate meeting. Until then, the only store under consideration for closing was Sausalito. Further, I find that that the decision to close the 24th Street store was influenced by Burkett and Knaphus's union-like demands, which demonstrated that the Union was about to descend on it. I further find that the motive for closing that store when it did was to carry out the announced policy of Nutraceutical's CEO, Bill Gay, that the company's proper response to union organizing was to close the facility. This closure was a direct result of that policy. It violated §8(a)(3) and (1) as alleged in the complaint.

g. The refusal to Rehire Kim Rohrbach

As previously noted, Rohrbach, the cheese buyer, was involved early in the union organizing campaign, although Respondent's knowledge of her involvement was clouded by her deliberate ambiguity as expressed toward 24th Street's assistant manager Ryan Rostvold. Yet, she had stood up for Ahern in the sweep log matter and Kloski seemed aware of her organizing as evidenced by his question at the June 10 birthday party. There can be no doubt she was, at the very least, under early suspicion of being involved with the organizing.

As with the other 24th Street employees, she was discharged on August 29. Even before her discharge, however, she admits she was an unhappy employee. She didn't trust higher management, believing both Remund and Gay to be untrustworthy. She also had expressed some unhappiness with working for a large corporation, rather than the family operation under which she had been more comfortable.

After the store closed she involved herself with an on-line support group, a Yahoo Group known as Reform Real Foods. This group consisted of about 120 persons, but it is unlikely that it was available to the general public. One has to join such a group to view its messages. Rohrbach eventually became one of the group's moderators, but not until the Fall of 2004, well after the events under scrutiny here.

In any event, Rohrbach, by then employed as a counterperson by the Cowgirl Creamery, [15] was job hunting at various on-line sites. In early May she saw Respondent's want-ad on CraigsList seeking to fill an opening for a product specialist. She submitted a résumé directly by e-mail to Kloski, together with a cover letter.

Her cover letter grants the awkwardness of her application:

> I expect that you might feel strong reservations about rehiring me, given that my vocal opposition to Nutraceutical's conduct in the whole 24th St. affair has no doubt done nothing to help my reputation in the eyes of Bruce or Sergio. And I have to acknowledge that I wouldn't feel comfortable about working for Nutraceutical at this point were I not to continue to lobby, during my free time and while off the job, for

[15] The Cowgirl Creamery is a small cheese producer in Point Reyes Station (Marin County) specializing in artisan-style cheeses. Rohrbach works at its San Francisco retail outlet, continuing to utilize and improve upon the cheese industry knowledge she had acquired while working for Respondent and its predecessor.

Rohrbach is well-educated, being a 1987 graduate of UCLA.

> certain workplace changes. But as strongly as I disagree with the company's recent conduct, I do not regard Bruce, Sergio, or Bill Gay as being substantially different from most people; i.e., I feel that, given certain conditions, even they are capable of acting in a responsible and reasonable fashion. I might add that even Bruce and Sergio were not able to destroy my appreciation for my job in the past, or to prevent me from completely fulfilling my workplace responsibilities. In the meantime, I doubt that you, Anthony, Conal, Ryan, Sara, etc. feel pleased about recent events, yourselves, and I'm sure you've had your private discussions. But despite your personal feelings, you've all managed to retain your positions and apparently conduct yourself in a suitably professional manner while at work; and I expect that I would be able to do the same were you to rehire me.

Respondent characterizes this cover letter as 'insulting' and I tend to agree. It is mildly disrespectful to Remund, Diaz and Gay and hardly characteristic of the usual mild-mannered jobseeker. Still, she is essentially announcing that if hired she intends to exercise her statutory right to engage in concert with other employees for their mutual benefit. While somewhat aggressive, she knew she had a record of being a good employee and knew that she had that record even though her quirky personality was well-known to management. She knew they knew what they were getting. She was only being herself.

This application triggered an interview on May 25, conducted not by Kloski, but by Remund, though Kloski was a participant. In large part this interview was a charade by both Remund/Kloski and Rohrbach. Neither was presenting themselves entirely honestly. Rohrbach showed up for the interview wearing a union t-shirt [16] and presented herself in a somewhat prickly manner. It would serve no purpose to describe the respective points of view. The fact is that Remund had no interest in rehiring her. Kloski, while not a Rohrbach fan, stood relatively silent on the issue, deferring it to Remund, as he must, because Remund had inserted himself into the scenario. Rohrbach, on the other hand, was trolling for evidence of wrongdoing as part of her anger over the store closure. In making this observation I am not suggesting that she was not legitimately seeking a job; her approach here was not much different from that of a "salt", a tactic commonly seen in construction industry organizing. Salts are protected by the Act. See generally, *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995) and similar cases. In fact there is no legitimate belief that she would not have done the job properly upon rehire. In fact, despite some marginal misgivings concerning her occasional verbal dustups with managers (such as her sweep log discussion with Wilmot), she was considered to be one of the better and more responsible employees at 24th Street, as demonstrated by the December 2002 performance appraisal. It can also be said that her 2003 evaluation was never performed due to the August closing and that 2003 issues had not yet been memorialized. There is testimony that suggests her appraisal might not have been as positive as in previous years.

I have no difficulty in concluding that the General Counsel has made out a prima facie case that Respondent denied her rehire for reasons prohibited by the Act. It had no intention of rehiring any 24th Street employees beyond the minimum to make it appear as if the 24th Street

[16] Rohrbach: "I had on a t-shirt from a union local that I was doing a lot of volunteer work with at the time, as well as my UFCW Unity button, I was very involved with their contract dispute."

employees were being given a fair shake. See Kloski's testimony in the footnote. [17] Remund agreed that 24th Street employees who had lost their jobs were not given preferential treatment for rehire at the other stores.

In addition, Respondent created another problem for itself, adding to that prima facie case. In late June 2003, Respondent, began, apparently on a limited basis, to hire new employees through an intermediary company, the Aerotek Staffing Agency. Respondent's Counsel used the word 'introduce' in his question,[18] which Remund accepted. The Aerotek contract in evidence, G.C.Exh. 35 (first page only), however, is dated June 30, 2004. I do not regard these yearly references to be inconsistent, since the 2004 contract may simply be a successor to an earlier, perhaps ad hoc, tryout version of the arrangement.

Although Remund characterized the use of Aerotek as 'primarily' aimed at mitigating workers compensation claims and not connected to the union organizing, Kloski said there was a different explanation. It came in connection with the Rohrbach interview.

A [Witness KLOSKI] Because she [Rohrbach] called me and asked me, a couple weeks after the interview, what was going on, are we going to hire her. I said, you have to ask Bruce. And I asked Bruce myself and he said that through conversations he had with Bill Gay, Bill asked him do you want her or not, he said no. Bill said, then don't hire her.
Q Do you recall when Fresh Organics began working with a temp agency to fill its job vacancies?
A Shortly after that interview with Kim Rohrbach.
Q Did you have any problems with that?
A Yes.
Q Did you vocalize these complaints to anyone?
A Yes.
Q Do you recall approximately when?
A Yeah. One day Bruce called a meeting with myself, Tony Yur, who is one of the head HR people from Utah, and a couple of representatives from the temp agency.

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[17] Q BY MR. GUERRA: Had you ever discussed the hiring of ex-24th Street employees with Remund?
A [Witness KLOSKI] Yes.
Q What were you told?
A That I should hire ex-24th Street employees if I could.
Q And what was your understanding as to why you were told that?
A So it wouldn't seem like they fired everybody because of the union drive.
Q And what's the basis of that understanding?
A Conversation.
MS. PLAZA DE JENNINGS: Objection, lack of foundation.
ADMINISTRATIVE LAW JUDGE KENNEDY: I'll let him answer, but you're going to have to backfill for foundation, Counsel.
MR. GUERRA: Okay.
Q BY MR. GUERRA: What's the basis of your understanding?
A That's what I just said, that they thought it would look good if I rehired some employees.
Q No, I meant how do you know this?
A From conversations I had with Bruce.
Q Do you recall approximately when those conversations took place?
A It happened a couple of times, definitely between late 2003, early 2004. I don't recall exactly when but it happened a couple of times, because when I was hiring it would come up.

[18] Q [By Mr. Hirschfeld] . . . When did you introduce Aerotek into the company?
A [Witness REMUND] In late June of '03. Tr. 925

Q Do you recall approximately when that meeting was?
A It was, I think, June 2004, somewhere in there, June, July.
Q And what did you say?
A I said, I really think this is a bad idea, I don't want to do this, do I have to do this.
Q And why did you think it was a bad idea?
A Because --
MS. PLAZA DE JENNINGS: Objection, Your Honor. What's the relevance?
MR. GUERRA: I'll withdraw.
Q BY MR. GUERRA: Did you explain why you thought it was a bad idea?
A Yes.
Q And what did you say?
A I said that in my experience the type of people that we are looking for are people who are dedicated and committed to natural foods and organics, and I felt that a temp agency wasn't going to provide us with those types of people. I wanted people who were going to be invested and committed to working in a store like that, and that seemed like a temp agency was not that, going to provide that type of person to us.
*Q Did you say anything else to Remund?*
*A Yeah. I asked him if this was just a way to keep Kim out of the store.*
*Q And by Kim, who do you mean?*
*A Kim Rohrbach.*
*Q And what was Remund's response?*
*A He became heated and he said, yes, that has something to do with it but this is what Bill Gay wants and this is what we have to do.* [Italics supplied.]

Kloski's recollection is most compelling. It so upset him as a true believer in the organic food philosophy that he decided to quit working for Respondent. Shortly thereafter, he found a job with Whole Foods, in Austin, Texas. The incident is seared in his memory. Indeed, he said he is not particularly enamored of managing a unionized store, but Remund and Gay's treatment of employees had become too much for him to stomach. Furthermore, he is corroborated by Brian Darr, a cashier at Thom's who heard something similar from his produce manager Patricia Buzzotta at about the same time. Remund's denial that he had ever said such a thing to anybody cannot be credited.

Therefore, the prima facie case is plain. Respondent did not want to hire Rohrbach because it did not want her in the store because of her past (and transparently current) association with the Union. Indeed, Kloski reports that Remund, as a result of directions from Nutraceutical CEO Bill Gay, was admitting that the contract with Aerotek was part of a plan to keep Rohrbach out and no doubt to serve as a barrier top keep other activists from being employed. However one views it, Aerotek was to serve as a layer of insulation from union organizing. Such a tactic would be consistent with Gay's earlier anti-union stance to Remund as repeated to Kloski and Irish.

Normally, once a prima facie case has been made, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) and *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the burden shifts to the respondent to establish by persuasive evidence that the employee would have been fired (or not hired) even absent their protected conduct. See also, *Naomi Knitting Plant*, 328 NLRB 1279 at 1281 (1999) (union animus need only be a motivating factor to establish the prima facie case).

The question it would seem, is whether Respondent has provided persuasive evidence that she would not have been rehired without reference to her union proclivities. Here, however, the evidence demonstrates an overarching effort on Respondent's part to deny rehire to as many former 24th Street employees it could get away with. Therefore, whether a given

employee might be burdened by nondiscriminatory reasons not to rehire him or her, becomes relegated to irrelevance. Even so, there is evidence in the record that Remund told the Board's Regional Office that the only reason it chose not to rehire Rohrbach was because she was a better fit for a cheese products coordinator job which it was considering creating, but never did. By the time of the hearing, however, it had added a number of other issues. Clearly, when it began adding these reasons, it risked over-gilding the lily. Cf. *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir.1982). However, in my opinion, all this is beside the point. The fact is, Respondent, as Kloski, observed, had created a policy to keep the 24th Street employees from returning; it didn't want union activists in its system.

In fact, it created the artificial barrier of the intermediate employer, Aerotek, to hinder all such efforts. Even if Respondent hired someone who later wanted representation by a union, it could divert the employee by saying they were really the employee of Aerotek, an entity the employee could not easily find, since his or her only knowledge about it would be as a name on a paycheck or W-2 form. Distancing itself from its employees in this manner is also consistent with Gay considering employees as a replaceable commodity. Therefore, all Respondent's reasons for not rehiring Rohrbach,[19] whether factually accurate or not, simply have no bearing on the reality it created. Its policy against unionization overrides any of the given reasons. In that circumstance, it cannot rebut the prima facie case.

Not only did Respondent rid itself of the 24th Street employees discriminatorily by closing the store, it did not want to allow any of them back beyond a select few to allow it to color its policy with innocence. Under that policy, and for no other reason, Rohrbach was denied rehire for reasons which violate §8(a)(3) and (1) of the Act.

## The Remedy

As noted in the introductory portion of this decision, the General Counsel had originally named only Fresh Organics as a Respondent. I granted the motion to amend the complaint to include as a respondent Fresh Organics's corporate parent, Nutraceutical Corp., based on the contention that the two are, in actuality, a single employer.

With regard to the single employer issue, the facts were developed over the course of the hearing. In this regard, there are several factors which are not in dispute. The first, of course, is the fact that they are separate corporations. The parent's stock is publicly traded, while the wholly-owned subsidiary is not. However, the parent does exercise significant, if not day-to-day, control over the subsidiary. The parent's chief financial officer, Les Brown, is a member, perhaps controlling member, of the subsidiary's two-person board of directors. It was he who essentially ran the special meeting of the board on August 25, 2003 where the corporate instruction was made to close the 24th Street store. Furthermore, the legal advice for that decision came from Nutraceutical's house staff attorneys and one, Soper, was present during the meeting to offer counsel. Fresh Organics had no legal advisers of its own. That had been demonstrated to be true earlier, in May. On May 22, pursuant to a request from the subsidiary's general manager and executive vice-president Remund, the parent had provided training concerning how to respond to a union organizing drive. That training was provided by a member of the parent's house counsel staff, attorney Langto from Park City headquarters. Later, the landlord-tenant dispute between Fresh Organics and the Allens over the 24th Street facility was processed by Nutraceutical house counsel.

Indeed, it appears that all of the labor relations support provided to the subsidiary came from the parent. Until June 2004 it provided payroll and connected support to the subsidiary as well as providing its human resources department for personnel issues. In fact, a number of

[19] These include charges of disloyalty, product disparagement, personality conflicts,

Nutraceutical's personnel policies were imposed on Fresh Organics. These included the annual appraisal formats, the employee improvement plan and advice concerning discipline. In addition, the so-called 'annual' service award for the subsidiary's employees was put in place by the parent and then taken away by the parent. And, although it was not put fully into place until June 2004, the decision to insert Aerotek Staffing as the direct employer of the subsidiary's employees was made by Bill Gay, Nutraceutical's chief executive officer. Significantly, Gay's policies regarding how to respond to union organizing dominates the facts seen here. He told the subsidiary's general manager, Remund, that he would close the store if the store's employees became involved in union organizing. That policy is what resulted in most of the unfair labor practices found here. Clearly the subsidiary's labor relations policies are centrally controlled by the parent, if not by Gay himself. Even its principal concept designer, Sergio Diaz came from Nutraceutical; he was, and is, Nutraceutical's director of marketing and sales. The subsidiary has no independence from the parent in regard to such matters—either labor relations or marketing. There is no arm's length relationship between the two. I find, therefore, that Respondent Fresh Organics and Respondent Nutraceutical Corp. are a single employer under the National Labor Relations Act. See generally, *Al Bryant, Inc.*, 711 F.2d 543 at 551 (3rd Cir. 1983), cert. den. 464 U.S. 1039 (1984), which recites the criteria normally used to determine if companies are, in reality, a single employer. There the court said:

> Four criteria have been used by the Board in determining whether separate entities constitute a single employer: interrelation of operations, common management, centralized control of labor relations, and common ownership. *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256, 85 S.Ct. 876, 877, 13 L.Ed.2d 789 (1965) (per curiam); see also *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1121-22 & 1121 n. 1 (3d Cir. 1982); *Sakrete of Northern California, Inc. v. NLRB*, 332 F.2d 902, 905 n. 4 (9th Cir. 1964), cert. denied,379 U.S. 961, 85 S.Ct. 649, 13 L.Ed.2d 556 (1965); *Parklane Hosiery Co.*, 203 NLRB 597, 612 (1973). The Board finds no one factor controlling, although it has stressed the first three factors, particularly centralized control of labor relations, which tend to show "operational integration." Id.; see also *NLRB v. Jordan Bus Co.*, 380 F.2d 219, 222 (10th Cir. 1967); *Parklane Hosiery Co.*, 203 NLRB at 612. Ultimately, single employer status depends on all the circumstances of the case and is characterized by absence of an "arm's length relationship found among unintegrated companies." *Local No. 627 International Union of Operating Engineers v. NLRB*, 518 F.2d 1040, 1045-46 (D.C. Cir. 1975), aff'd on this issue per curiam sub nom. *South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976); see *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378, 384 (9th Cir.), cert. denied, 444 U.S. 940, 100 S.Ct. 293, 62 L.Ed.2d 306 (1979).

Based on the above recited facts, it is clear that Respondents easily fall within the *Al Bryant* single employer definition. There is nothing approaching an arm's length relationship here. Most importantly, the labor relations policy of the subsidiary is totally dominated by the parent. But ownership is the same—Remund owns nothing, it is all owned by Nutraceutical—and operational matters, such as the store closure decision, are governed by the parent. In that regard, an executive of the parent, Brown, was placed on the subsidiary's board of directors to do the parent's bidding. In fact, Remund considers the Nutraceutical CEO, Bill Gay, to be his immediate boss. All this leads to the inescapable conclusion that the two are a single employer under the Act. Therefore, they are both responsible for the unfair labor practices committed and both are obligated to remedy them. *Masland Industries*, 311 NLRB 184 at 186 (1993); Cf., *Radio & Television Broadcast Technicians v. Broadcast Service of Mobile*, 380 U.S. 255 (1965)(per curiam). "[To determine if employers may be found a single employer] [t]he

controlling criteria, set out and elaborated in [NLRB] decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership."

In addition, parent liability may also be found under the *Dews Construction* [20] rule where one employer obtains another employer to commit an unfair labor practice. In this regard, see the remand decision in *Esmark, Inc.*, 315 NLRB 763 at 767 ff. as well as *International Shipping Assn*., 297 NLRB 1059 (1990). Rather clearly, Remund was following orders emanating from Nutraceutical.

Having found that Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As Respondents discriminatorily discharged Sarah (Mitch) Genlot-Joslyn and Adriel Ahern, they must offer them reinstatement to their previous jobs, or if they are not available, to substantially similar jobs, and make them whole for any loss of earnings and other benefits they may have suffered. Respondents shall take this action without prejudice to their seniority or any other rights or privileges they may have enjoyed. Backpay, if any, shall be computed on a quarterly basis from the date of the discharge to the date Respondents make a proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Furthermore, Respondents shall be required to expunge from their personnel files any reference to their illegal discharge. *Sterling Sugars*, 261 NLRB 472 (1982).

Likewise, they shall expunge from Sonja (Simon) Knaphus's personnel file the annual appraisal given her in August 2003 to the extent that it rated her negatively based upon her participation in the meeting of August 7, 2003. In each case Respondents will also be ordered to advise each of them in writing of the expunction and that the discharge or negative appraisal, as applicable, will not be used against any of them in any way.

Insofar as the store closure is concerned, it should be noted first that the General Counsel at the outset has advised that it does not seek an order requiring the reopening of the store. This is no doubt due to, among other things, the fact that at the time of the hearing, some 18 months after the closure, remodeling had yet to begin. This is in large part due to a landlord-tenant dispute Respondents were having as a result of apparent structural problems discovered when the 24th Street store was finally gutted. As of the time of the hearing that dispute remained unresolved. Therefore, there was no facility which could have been reopened, order or no order. Instead, the General Counsel seeks to have all of the 24th Street employees who lost their jobs upon its unlawful closure to be placed on a preferential rehire list for that store when it reopens. I concur with that sought-for remedy, but believe it to be adequate only as far as it goes. There is no reason at this juncture to assume that the store will ever reopen. It may or may not. Therefore, the preferential rehire list will be applicable to any store in the Fresh Organics system, except for Sausalito which might require a San Francisco employee a difficult commute. Furthermore, since I have found that selection of the 24th Street store for closure was in response to union organizing there, the closure in reality effected nothing more than a common illegal discharge for all these employees. Therefore, I see no reason not to apply the usual backpay remedy applied in discriminatory discharge cases. Had Respondents not made this discriminatory decision, in all likelihood the Sausalito store would have been the one chosen for the concept store remodel and the 24th Street employees would still be employed. *Masland Industries*, supra.

[20] 231 NLRB 182 (1977), enfd. 578 F.2d 1374 (3rd Cir. 1978).

Moreover, I also find that the discriminatory closing of the 24th Street store had the foreseeable result of chilling union activity at its other stores, Stanyan, Thom's and Sausalito as well as other stores elsewhere in the country. [21] This partial closing of its operation was an object lesson to the employees of the remaining stores: 'If you choose to unionize, there will be serious consequences levied upon your livelihood.' Respondent's actions here are very grave and therefore the remedy must take that gravity into account. Therefore, I will apply a broad order here, requiring Respondents to cease and desist from infringing in any other manner on the rights guaranteed employees by §7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). Among other things, Respondents must rehire these individuals themselves and not use the services of a contract labor supplier such as Aerotek in order to establish the status quo ante. Moreover, the remedial notice cannot be limited to its San Francisco area stores; it must have a broader reach. The object lesson of closure to avoid unionization can reasonably be assumed to have spread throughout its retail operations wherever situated.

Finally, Respondents shall be directed to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practices which have been found.

Based upon the foregoing findings of fact, legal analysis, and the record as a whole I hereby make the following

Conclusions of Law

1. Respondent Fresh Organics Inc., is an employer engaged in commerce and in an industry affecting commerce within the meaning of § 2(2), (6) and (7) of the Act.

2. Respondent Nutraceutical Corporation is an employer engaged in commerce and in an industry affecting commerce within the meaning of § 2(2), (6) and (7) of the Act.

3. Respondents Fresh Organics, Inc., and Nutraceutical Corporation constitute a single employer under the Act and are jointly and severally liable for the unfair labor practices found herein.

4. Respondents did not violate §8(a)(1) as alleged in paragraphs 6(a) and (b) of the complaint.

5. Respondents did violate §8(a)(1) when, about June 18, 2003, it announced and implemented a supposedly annual employee service tenure award as it was in part motivated to dissuade employees from seeking union representation.

6. In mid-August 2003, Respondents violated §8(a)(1) by downgrading the annual appraisal for Sonja (Simon) Knaphus because she engaged in activity protected by §7 of the Act.

7. On June 26, 2003, Respondents discharged its employee Sarah Genlot-Joslyn in violation of §8(a)(3) and (1) because of her union and other protected concerted activities.

8. On July 23, 2003, Respondents discharged its employee Adriel Ahern in violation of §8(a)(3) and (1) because of her union and other protected concerted activities.

9. On August 29, 2003 Respondents violated §8(a)(3) and (1) when it closed its 24th Street store and terminated the following twenty-nine employees:

| | |
|---|---|
| Dorothy R. Adams | Sonja (Simon) Knaphus |
| Sean B. Andrews | Diana H. Kuemmel |
| Jonathan H. Burkett | Colin R. Lapuyade |

[21] The record shows that it operates at least one other store, located in Scottsdale, Arizona.

| | |
|---|---|
| Kelly M. Cronin | Greg M. Lashaw |
| Sharna D. Fey | Michael A. Lopez |
| Christina D. Fisher | Rita J. Morris |
| Zoe Friedman-Cohen | Shawn M. Mowell |
| Charles A. Glover | Ryan P. Newton |
| Wendy L. Granger | Joshua L. Peach |
| Shaun M. Hannan | Adam L. Rabinovitz |
| Adrian J. Hernandez | Kimberly M. Rohrbach |
| Kristin D. Hornstra | George W. Schulz |
| Sarianne Huyett | Brian J. Schumacher |
| Shauna L. Katz | Jennifer A. Stone |
| Dallas A. Kavanagh | |

10. On or about June 22, 2004 Respondents violated §8(a)(3) and (1) when it refused to rehire Kimberly M. Rohrbach for an opening at its Stanyan Street store.

Based upon these findings of fact and conclusions of law and on the entire record, I issue the following recommended [22]

ORDER

Respondents, Fresh Organics, Inc., San Francisco, California and Nutraceutical Corporation, Park City, Utah, as a single employer, their officers, agents, and representatives, shall

1. Cease and desist from:

a. Announcing and offering fringe benefits such as length of service awards in response to union organizing and/or to influence employees in deciding whether to seek union representation.

b. Discharging or otherwise discriminating against any employee for supporting United Food and Commercial Workers Union Local 648, United Food and Commercial Workers International Union, or any other union.

c. Closing a part of its business, such as one of its retail stores in a manner which has the necessary and foreseeable effect of interfering with, restraining or coercing its remaining employees from freely exercising their rights under §7 of the Act.

d. In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by §7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days from the date of this Order, offer Sarah Genlot-Joslyn and Adriel Ahern full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions in its other San Francisco stores, displacing, if necessary, any more junior employees, without prejudice to Genlot-Joslyn or Ahern's seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

[22] If no exceptions are filed as provided by § 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in § 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

b. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Genlot-Joslyn and Ahern, and within 3 days thereafter notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

c. Within 14 days from the date of this Order rescind those portions of Sonja (Simon) Knaphus's 2003 annual appraisal as influenced by her participation in the August 7, 2003 meeting, and within 3 days thereafter notify her in writing that this has been done and that the evaluation will not be used against her in any way.

d. Within 14 days from the date of this Order offer reinstatement to each of the twenty-nine discriminatees who lost their jobs due to the closure of the 24th store to any position in its existing operations which he or she is capable of filling, giving preference to the discriminatees in order of seniority; and in the event of the unavailability of jobs sufficient to permit immediate reinstatement of all the discriminatees, place those for whom jobs are not now available on a preferential hiring list for any future vacancies which may occur in jobs the said discriminatees are capable of filling. If it offers a discriminatee a job at its Sausalito store, that individual shall not lose his or her place on the preferential rehire list should he or she choose to decline the offer. In addition, Respondent shall make these discriminatees whole by paying each of them a sum of money equal to the amount that would have been earned as wages from the date of the store's closure to the date Respondents make an offer of reinstatement, plus interest, using the *Woolworth* and *New Horizons*, both supra, calculation rules. [23]

e. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

f. Within 14 days after service by the Region, post at its stores in San Francisco and Sausalito, California and any retail operation it may currently have elsewhere in the United States, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondents' authorized representative, shall be posted by Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondents have gone out of business or closed its remaining facilities, Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current retail employees and former retail employees employed by Respondents at any time since June 18, 2003.

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[23] Cf., *Purolator Armored, Inc.*, 268 NLRB 1268, 1269 (1984), enfd. 764 F.2d 1423 (11th Cir. 1985)

[24] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

g. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondents have taken to comply.

James M. Kennedy
Administrative Law Judge

Dated:
Washington, D.C. November 18, 2005

Appendix

Notice to Employees
Posted By Order of the
National Labor Relations Board
An Agency Of The United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

**WE WILL NOT** announce and offer fringe benefits such as tenure service awards in response to union organizing and/or to influence employees in deciding whether to seek union representation.

**WE WILL NOT** discharge or otherwise discriminate against any employee for supporting **United Food and Commercial Workers Union Local 648, United Food and Commercial Workers International Union**, or any other union.

**WE WILL NOT** close a part of our business, such as one of our retail stores in a manner which has the necessary and foreseeable effect of interfering with, restraining or coercing our other employees from freely exercising their rights under §7 of the Act.

**WE WILL NOT** in any other manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by §7 of the National Labor Relations Act.

**WE WILL** within 14 days from the date of the Board's Order, offer **Sarah (Mitch) Genlot-Joslyn** and **Adriel Ahern** full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions at other stores, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole, plus interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them.

**WE WILL** within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of **Genlot-Joslyn** and **Ahern**, and within 3 days thereafter notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

**WE WILL** within 14 days from the date of the Board's Order rescind those portions of Sonja (Simon) Knaphus's 2003 annual appraisal as influenced by her participation in the August 7, 2003 meeting, and within 3 days thereafter notify her in writing that this has been done and that the evaluation will not be used against her in any way.

**WE WILL** Within 14 days from the date of the Board's Order offer reinstatement to each of the twenty-nine discriminatees who lost their jobs due to the closure of the 24th store to any position in our existing operations which he or she is capable of filling, giving preference to them, in order of seniority; and in the event of the unavailability of jobs sufficient to permit immediate reinstatement of all the discriminatees, place those for whom jobs are not now available on a preferential hiring list for any future vacancies which may occur in jobs the said discriminatees are capable of filling. If we offer a a person on the preferential rehire list a job at our Sausalito store, that individual shall not lose his or her place on the list if he or she chooses to decline the offer. In addition, **WE SHALL** make these individuals whole by paying each of them a sum of money equal to the amount that would have been earned as wages from the date of the store's closure to the date Respondents make an offer of reinstatement, plus interest. These twenty-nine employees are:

| | |
|---|---|
| Dorothy R. Adams | Sonja (Simon) Knaphus |
| Sean B. Andrews | Diana H. Kuemmel |
| Jonathan H. Burkett | Colin R. Lapuyade |
| Kelly M. Cronin | Greg M. Lashaw |
| Sharna D. Fey | Michael A. Lopez |
| Christina D. Fisher | Rita J. Morris |
| Zoe Friedman-Cohen | Shawn M. Mowell |
| Charles A. Glover | Ryan P. Newton |
| Wendy L. Granger | Joshua L. Peach |
| Shaun M. Hannan | Adam L. Rabinovitz |
| Adrian J. Hernandez | Kimberly M. Rohrbach |
| Kristin D. Hornstra | George W. Schulz |
| Sarianne Huyett | Brian J. Schumacher |
| Shauna L. Katz | Jennifer A. Stone |
| Dallas A. Kavanagh | |

**FRESH ORGANICS, INC., d/b/a REAL FOODS COMPANY, a Wholly-Owned Subsidiary of NUTRACEUTICAL CORPORATION and NUTRACEUTICAL CORPORATION**

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400, San Francisco, CA 94103-1735

(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5138.